

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2007 Session

FARA LYN (WORN) LOBERTINI v. JOE MARTIN BROWN, III

**Appeal from the Juvenile Court for Williamson County
No. 46189 Lonnie Hoover, Judge**

No. M2006-01485-COA-R3-JV - Filed January 31, 2008

The primary residential parent of the parties' five-year-old child requested permission to relocate to California. The mother's stated reason for the relocation was that she had married a man who resided and worked in California. The father opposed the move. The mother was spending substantially more time with the child and thus Tenn. Code Ann. § 36-6-108(d) applies. The trial court denied the request based on numerous findings and modified the Permanent Parenting Plan, making the father the primary residential parent and granting the mother two days of visitation per month. The mother appealed. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RILEY E. ANDERSON, SP. J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

Paula Ogle Blair, Nashville, Tennessee, for the appellant, Fara (Worn) Lobertini.

Deana C. Hood, Franklin, Tennessee, for the appellee, Joe Martin Brown, III.

OPINION

Joe M. Brown, III (Father) and Fara Worn Lobertini (Mother) were in a relationship from 2001 to 2004 that never resulted in marriage. During this relationship, the parties became the parents of a child born on May 18, 2002. Following the parties' split, Mother filed a Petition to Establish Paternity, Set Child Support, and Enter a Parenting Plan.

On April 19, 2005, the parties entered into an Agreed Permanent Parenting Plan and an Agreed Order. The Parenting Plan provided that Mother was the primary residential parent of the minor child. The Plan named Father as the alternative residential parent, set scheduled parenting time for Father, allocated holidays, and ordered Father's child support obligation.

In June of 2005, Mother sent Father notice of her intent to move with the parties' minor child to California. Mother's stated reason for relocating was that she was engaged to marry John Lobertini in October of 2005, and that Mr. Lobertini lived and worked in California. Father

contested the move and additionally requested that the juvenile court modify the residential parenting provisions of the Permanent Parenting Plan. After a hearing on September 20, 2005, the juvenile court referee granted Father's Petition in Opposition to Relocation and found that Mother was not allowed to relocate to California with the minor child. Mother appealed the referee's decision and requested that a juvenile court judge conduct a re-hearing.

Before Mother's appeal was set to be heard by the juvenile court judge, the parties entered into an Agreed Order. In that Order, the parties agreed to "continue the hearing until December 6, 2006, or at anytime the parties motion the Court for a hearing." The Order further provided that "Mother will be allowed to exercise her residential time with the minor child in Sacramento, California area and that the parties will continue to exercise their residential time in percentages as in the Permanent Parenting Plan in the amount of the Mother's sixty to sixty-five percent (60% - 65%) and the Father's thirty-five to forty percent (35% - 40%), which is more than the standard case." The parties also set a schedule for the next eleven months as to when Father would pick up the child in California and when Mother would pick up the child in Tennessee.

On March 10, 2006, five months after entering the Agreed Order to stay Mother's appeal, Father filed a petition requesting the court to set Mother's appeal for hearing. In addition to requesting a hearing on the appeal, Father petitioned the court to modify the residential parenting provisions of the Permanent Parenting Plan should the denial of her appeal be affirmed by the juvenile court judge. In the petition, Father stated *inter alia* that he had received a telephone call from Rachel Lobertini, the ex-wife of Mother's new husband, John Lobertini, who stated that the parties' child had been "abused" by Mr. Lobertini. Mother's appeal and Father's petition for modification of the parenting plan were both set for hearing on May 24, 2006.

In the interim, Mother was served with Father's petition for modification on March 16, 2006, along with a subpoena to testify at the hearing set for May 24, 2006. At the same time, Mother was served with an ex parte order preventing her from removing the child from Tennessee. Four days later, on March 20, 2006, Mother's counsel filed a Motion to Withdraw. Mother made no effort to retain another attorney to represent her. Instead, on May 8, 2006, Mother filed a *pro se* Response to Father's Petition and planned to represent herself at the May 24, 2006 trial.

Both Mother and Father appeared at the May 24, 2006 hearing. Father was represented by counsel and Mother appeared *pro se*. Following the hearing, the juvenile court judge dismissed Mother's appeal of the referee's earlier denial of her relocation request, and granted Father's Petition to Modify the Permanent Parenting Plan designating Father as the primary residential parent and giving Mother visitation two days a month. The judge's decision was based on fourteen specific findings of fact that were set forth in an order entered on June 14, 2006. This appeal followed.

Mother presents four issues on appeal. First, she contends she was not given sufficient notice of the May 24, 2006 hearing. Second, she contends the juvenile court erroneously relied on hearsay in making the custody determination. Third, she contends that the juvenile court erred in changing custody of the minor child. Fourth, Mother contends she was not given the opportunity for "a full and fair hearing."

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

Mother presents four issues on appeal. We will discuss each in turn.

NOTICE - DUE PROCESS

Mother contends she was denied due process because she was not served with a summons, and she was not given sufficient notice of the hearing on Father's Petition to Modify the Permanent Parenting Plan or her appeal of the referee's decision denying her relocation to California.

A deficiency in the manner of service is waived by the defendant's filing of a general answer without reservation of the manner of service. *Estis v. Kelley*, No. 01A01-9709-CV-00513, 1997 WL 803708, at *2 (Tenn. Ct. App. Dec. 30, 1997) (citing *Nashville, C. & St. L. Ry. Co. v. Williamson*, 192 S.W. 385 (Tenn. 1916); *Blue Grass Canning Co. v. Wardman*, 525 S.W. 137 (Tenn. 1899); *Walkup v. Covington*, 73 S.W.2d 718 (Tenn. Ct. App. 1933)). Mother voluntarily filed a written response to Father's petition, which response constituted a general appearance and waiver of the manner or sufficiency of service. Moreover, when she attended the May 24, 2006 hearing, she did not object to the lack of notice or request a continuance.

With regard to her claim that she did not have sufficient time to prepare for the hearing, if Mother believed she needed more time to prepare for the hearing on either her appeal or Father's petition, she was under a duty to state her objection and/or request for a continuance at or prior to the May 24, 2006 hearing. She did neither.

If an issue is not properly raised in the trial court, it cannot be raised for the first time on appeal. *See Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *4 (Tenn. Ct. App. Sept. 3, 2003) (citing *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). We have concluded that Mother did not properly raise either of the foregoing issues to the juvenile court

judge. Therefore, the issues are without merit.

HEARSAY

Mother contends the juvenile court relied on inadmissible hearsay in making its findings and final determinations as to custody. Specifically, Mother argues that the California Child Protective Services Report and any statements made by Mr. Lobertini's ex-wife and daughter were inadmissible hearsay and that it was reversible error for the juvenile court to consider.

"Generally, failure to make a timely, specific objection in a trial court prevents a litigant from challenging the introduction of inadmissible evidence for the first time on appeal." *Welch v. Bd. of Prof'l Responsibility for the Supreme Court of Tenn.*, 193 S.W.3d 457, 464 (Tenn. 2006) (citing *M. Lewis & Sons v. Illinois Cent. R. Co.*, 259 S.W. 903, 904 (Tenn. 1924); *Grandstaff v. Hawks*, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000); *Wright v. United Servs. Auto. Ass'n*, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990)). Error predicated on a ruling admitting evidence must affect a substantial right of the party and "[i]n case the ruling is one admitting evidence, a *timely objection or motion to strike appears of record*, stating the specific ground of objection if the specific ground was not apparent from the context." Tenn. R. Evid. 103(a)(1) (emphasis added). Mother did not object at trial to the admission of any evidence, and her failure to object to the evidence at issue constitutes a waiver of the issue for purposes of appeal.

DENIAL OF MOTHER'S REQUEST TO RELOCATE

AND

MODIFICATION OF THE PARENTING PLAN

The parental relocation statute, Tenn. Code Ann. § 36-6-108, applies when a parent seeks to relocate outside the state or more than 100 miles from the other parent within the state. Mother's request to relocate to California made the statute applicable. The statute also provides that if the parents are *not* spending "substantially equal" intervals of time with their child, and if the parent spending the greater amount of time with the child is the one seeking to relocate, then relocation "shall" be permitted *unless* one or more of three grounds listed in Tenn. Code Ann. § 36-6-108(d) are found.¹ It is undisputed that Mother was spending more time with the child than Father. Thus, the grounds set forth in Tenn. Code Ann. § 36-6-108(d) applied to her relocation request. The grounds are:

- (1) The relocation does not have a reasonable purpose;
- (2) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or

¹ A different set of rules apply if the parents are spending substantially equal intervals of time with the child. See Tenn. Code Ann. § 36-6-108(c).

(3) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. § 36-6-108(d)(1)(A)-(C). The statute further provides that "specific and serious harm to the child" includes, but is not limited to:

(A) If a parent wishes to take a child with a serious medical problem to an area where no adequate treatment is readily available;

(B) If a parent wishes to take a child with specific educational requirements to an area with no acceptable education facilities;

(C) *If a parent wishes to relocate and take up residence with a person with a history of child or domestic abuse or who is currently abusing alcohol or other drugs;*

(D) If the child relies on the parent not relocating who provides emotional support, nurturing and development such that removal would result in severe emotional detriment to the child;

(E) *If the custodial parent is emotionally disturbed or dependent such that the custodial parent is not capable of adequately parenting the child in the absence of support systems currently in place in this state, and such support system is not available at the proposed relocation site; or*

(F) If the proposed relocation is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, that does not have an adequately functioning legal system or that otherwise presents a substantial risk of specific and serious harm to the child.

Tenn. Code Ann. § 36-6-108(d)(2) (emphasis added).

If the trial court finds one or more of the grounds listed in § 36-6-108(d), the court is then required to make a determination as to whether or not to permit relocation of the child based on the best interest of the child. Tenn. Code Ann. § 36-6-108(e). If the court finds it is not in the best interest of the child to relocate then the requested relocation is to be denied. Moreover, the statute directs that if the parent's request to relocate with the child is denied and that parent elects to relocate without the child, then the court shall make a custody determination and shall consider all relevant factors. Tenn. Code Ann. § 36-6-108(e).

The juvenile court made fourteen specific findings to support its dismissal of Mother's appeal of the referee's decision denying her relocation; however, the juvenile court did not specifically articulate the three grounds listed in Tenn. Code Ann. § 36-6-108(d). Although the trial court should articulate the applicable statutory grounds, as the statute clearly indicates, this court has stated that

“Tenn. Code Ann. § 36-6-108(d) *does not appear to require specific findings as to the three elements* listed [in the statute], and we have found no Tennessee case which directly addresses whether such findings are required.” *Placencia v. Placencia*, 48 S.W.3d 732, 735 (Tenn. Ct. App. 2000) (emphasis added). Given the fundamental nature of the interests involved, the juvenile court *should* address the grounds listed in the statute. *Id.*

The juvenile court made the following findings that are relevant to the issue of whether the requested relocation would pose a threat of specific and serious harm to the child:

- Mother has a drinking problem or has had a drinking problem.
- Mother is on two different types of anxiety medications at the present time or has them prescribed to her.
- Mother lives in California with a man who’s been married four times, who apparently from the testimony and from what is available in the record, has some kind of temper, has some sort of dysfunction with his current children, who apparently has been less than pleasant in dealing with [the child].
- Mother is out in California by herself and she’s virtually unemployed.
- Mother only averaged \$4,000.00 per year over the last three years and I am dubious of that amount and she is basically just living on a wing and a prayer.
- Mother is married to this kind of mean-spirited guy, who has a history of marriages that do not work, has a history of dysfunction with his own children.
- Mother has these alcohol issues and these anxiety issues and there is no family in California for her to rely on.
- Mother is just hanging around Mr. Lobertini’s house just hoping that he will dole out a little money for her and her son to get by on and I do not just see that that is a proper environment.
- Father has a good job, has a full-time job, has a good living, works hard, has a good family here that’s all behind him in supporting him. He has five cousins, [the child] has five cousins that he sees on a daily basis and he sees his grandparents, uncles, and aunts, cousins, on a daily basis, lots of family interaction.
- The child loves his father and his home.
- The child has lived his whole life in Wilson County and he does well there.
- Father is in a much better position to raise this child than Mother.

Based upon these findings, and the fact that Mother has taken up residence with a man of questionable character, who has a dysfunctional relationship with his children and has had issues dealing with Mother’s child, the concerns of abuse by Mr. Lobertini, the fact Mother has a history of alcohol abuse and anxiety issues, and that she will have no family or reliable support system in California, the record clearly supports the finding and conclusion that the proposed relocation poses a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody.

With the determination that one of the grounds exists to deny the requested relocation, we are required to determine whether relocation of the child is in the best interest of the child. *See* Tenn. Code Ann. § 36-6-108(e). If the court finds it is not in the best interest of the child to relocate then the requested relocation is to be denied. *Id.*

Although the juvenile court failed to articulate specific findings as to best interest in dismissing Mother's appeal, we find the juvenile court made an implicit best interest analysis. *See Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *5 (Tenn. Ct. App. Sept. 3, 2003). As the record reflects, the juvenile court found that the man Mother married suffers from dysfunction with his own minor children, that Mother was unemployed and completely dependent on her new husband, that she lacks a support system in California, and that she suffers from alcohol and anxiety issues. Moreover, the court found the environment in Mother's home in California was not a proper environment for the child and in contrast to her situation, the court found that Father was surrounded by family who had been involved in the child's day-to-day life since his birth, and the child is doing very well in Wilson County. Significantly, the juvenile court found that "anyway you look at it [Father] is in a much better position to raise this child than [Mother]." For the foregoing reasons, the record fully supports the finding that it is not in the best interest of the child to relocate to California with Mother.

As we mentioned earlier, the statute directs that if the parent's request to relocate with the child is denied and that parent elects to relocate without the child, then the court *shall* make a custody determination and shall consider all relevant factors. This is mandated by Tenn. Code Ann. § 36-6-108(e). Notwithstanding the statute, Mother contends the juvenile court erred by modifying custody because, she alleges, Father did not prove a substantial and material change of circumstance. Although we disagree with Mother's contention that there was not a substantial and material change of circumstance resulting from her relocation to California, Tenn. Code Ann. § 36-6-108(e) does not require a parent to prove a substantial and material change as a condition precedent to modifying custody. Instead, the condition precedent mandated by Tenn. Code Ann. § 36-6-108(e) is that the request to relocate with the child was denied and, in spite of the court's denial, that parent still plans to relocate.

Here, Mother gave notice that she planned to relocate in spite of the court's denial of her request to relocate with the child. As a consequence of her decision, the court was under an affirmative duty to make a custody determination as Tenn. Code Ann. § 36-6-108(e) mandates. In making that determination, the court was to consider all relevant factors. *Id.* As the statute required, after considering the relevant factors, the court made a custody determination by designating Father as the primary residential parent. The court also amended the Parenting Plan and awarded Mother visitation. It is evident from the record that the juvenile court considered relevant factors in making the custody determination, including evidence of physical or emotional abuse to the child, the importance of continuity in the child's life, the mental and physical health of the parents, and the fact her new residence was 2,000 miles away. Finding no error with the juvenile court's custody determination, we affirm.

“FULL AND FAIR HEARING”

Mother claims that she was “forced” to proceed without an attorney and that she “was forced to act as her own attorney and cross-examine Father.” It is upon this basis she contends she was deprived of fair and equal treatment by the juvenile court.

All litigants, including *pro se* litigants, are entitled to fair and equal treatment under the law, *see Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000), and Mother was afforded such treatment by the juvenile court. The record reveals that Mother was not “forced” to proceed without an attorney at the May 24, 2006 hearing. She had more than two months to obtain counsel after her previous counsel filed her motion to withdraw, yet she declined to do so. Moreover, on the day of the hearing, Mother failed to make a request for a continuance in order to obtain counsel.

As for her complaint that she was “forced” to cross-examine Father, Mother, as a *pro se* litigant, had the right to cross-examine him and any witnesses called by her adversary. She also had the right not to cross-examine a witness. Moreover, the juvenile court judge could not act as her attorney. *See Whitaker*, 32 S.W.3d at 227 (holding a *pro se* litigant may not shift the burden of litigating her case upon the trial court). Mother’s complaints that the substantive and procedural requirements of litigants represented by counsel were imposed upon her are without merit because *pro se* litigants are not excused from the substantive and procedural requirements required of other parties. *Id.*

The record clearly indicates that Mother was allowed to fully participate and represent herself in the May 2006 hearing, and that the juvenile court judge afforded her fair and equal treatment. We, therefore, find no merit to her claim that she was not afforded fair and equal treatment.

IN CONCLUSION

The judgment of the juvenile court is affirmed, and this matter is remanded with costs of appeal assessed against Mother.

FRANK G. CLEMENT, JR., JUDGE